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DELIVERING INDIGENTS' RIGHT TO COUNSEL WHILE RESPECTING LAWYERS' RIGHT TO THEIR PROFESSION: A SYSTEM "BETWEEN A ROCK AND A HARD PLACE"

STAFFORD HENDERSON BYERS *

In this article, Professor Byers sets the stage for discussion by juxtaposing indigents' right to counsel with lawyers' right to the fruits of their labor. Following, Professor Byers asks a number of probing questions: Is it mandatory that society apply an "either or" approach to this matter? Is it possible to provide indigents with effective assistance of counsel, while respecting lawyers rights? Is a lawyer's right to the gains of her profession constitutionally protected? Can any branch of government (judicial, legislative, or executive), compel an attorney to represent indigents, or anyone else for that matter, without compensation? Whose responsibility is it (the private bar, individual attorneys, or the government) to protect the constitutional rights of citizens? In sum, Professor Byers concludes that it is the government's responsibility to protect the constitutional rights of its citizens. He then closes the article with thought provoking recommendations concerning the interaction between indigents' right to counsel and lawyers' right to compensation for their labor.

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I. INTRODUCTION

As the 21st century approaches, indigents' right to counsel, in both criminal and civil matters, is in a state of flux as it relates to the *pro bono* commitment of lawyers. This state of flux is nowhere more evident than in judicial decisions. As a result, there has been a spirited discussion regarding this topic.¹ One approach to this problem analyzes it from a professional responsibility perspective. According to this approach, lawyers are expected to render unpaid legal services to indigents and subsequently, to make an annual report to the appropriate regulatory authority notifying it of the lawyer's fulfillment of his duty.² Another approach focuses on the monopolistic character of the legal profession as it relates to the delivery of legal services to indigents. Because of this monopoly, it is urged that the profession take reasonable steps to alleviate the problem. Invariably, the only remedy is mandatory *pro bono* services.³

Another school of thought is the officer-of-the-court notion. This view advocates mandatory *pro bono* service to indigents as an inherent duty of each lawyer as an officer of the court and as an implied condition for the license to practice law.⁴ Moreover, under this view, only mandatory *pro bono* service to indigents will meet the exigencies of the desperate legal needs of the "disadvantaged" and "disempowered."⁵

1 See, e.g., Arthur Gilbert & William Gorenfeld, *The Constitution Should Protect Everyone - Even Lawyers*, 12 PEPP. L. REV. 75, 84-86 (1984) (indicating that Constitution was intended to protect lawyers against such atrocities as compelled representation of clients without compensation); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171 (1967) (characterizing issue in terms of fairness, burden to one and benefit to another); Joseph L. Sax, *Taking, Private Property and Public Rights*, 81 YALE L.J. 149, 150-51 (1971) (outlining problem of determining when "taking" occurs constitutionally); Joseph L. Sax, *Taking and the Police Power*, 74 YALE L.J. 36, 36 (1964) (discussing zoning and other regulations exercised by the state).

2 See MODEL RULES OF PROFESSIONAL CONDUCT RULE 6.1 (1993).

3 See Barlow F. Christensen, *The Lawyer's Pro bono Publico Responsibility*, 1981 AM. B. FOUND. RESEARCH J. 1.

4 See Debra Burke et al., *Mandatory Pro bono! Cui Bono?*, 25 STETSON L. REV. 983, 987 (1996) (addressing monopoly argument against attorneys); Steven B. Rosenfeld, *Mandatory Pro bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 255 (1981) (discussing Association of the Bar of the City of New York Proposal as well as RPC Discussion Draft Proposal).

5 See Dean S. Spencer, *Mandatory Public Service for Attorneys: A Proposal for the Future*, 12 SW. U. L. REV. 493, 519 (1981) (stating that legal profession which holds "a monopoly on access to the keys of legal power. . . has a special ethical concern for alleviating this inequity").

Opponents of mandatory *pro bono* legal service argue that mandatory service violates many constitutional rights, among them the Thirteenth Amendment prohibition of involuntary servitude,⁶ the Due Process Clause of the Fourteenth Amendment (which incorporates the "Takings" Clause of the Fifth Amendment),⁷ as well as the Equal Protection Clause.⁸ Another argument, although used less frequently, posits that mandatory *pro bono* service interferes with the right of association implicit in the First Amendment.⁹

Interestingly enough, Canon 2 of the ABA Model Code of Professional Responsibility only places an ethical duty to represent the poor.¹⁰ However, the Sixth Amendment right to effective assistance of counsel creates an enormous burden on the legal profession.¹¹ By one estimate, 30% to 70% of those charged with

6 See U.S. CONST. amend. XIII, § 1. This section provides in full: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

7 See U.S. CONST. amend. V. In relevant part, this amendment reads: "nor shall private property be taken for public use, without just compensation." *Id.* See generally, *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that due process clause guarantees that property will not be taken for public use without due process); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238 (1957) (indicating that state cannot exclude person from practice of law without due process).

8 See U.S. CONST. amend. XIV, § 1. In relevant part, this section reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." *Id.*; see also David L. Shapiro, *The Enigma of a Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 762 (1980) (addressing Fourteenth Amendment ramifications of mandatory *pro bono* work).

9 See U.S. CONST. amend. I. The amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*; see also Shapiro, *supra* note 8, at 735, 766 & n.153 (discussing free-conscience argument concerning *pro bono* work).

10 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1991). This section coincides with ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 6.1, which reads "A lawyer should aspire to render at least (50) hours of *pro bono* public legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means. . . ." *Id.*

11 See U.S. CONST. amend. VI. In pertinent part, this amendment reads "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." *Id.*; see also ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 119 (1980). This great need has developed for several reasons. First, there are many indigents caught up in the criminal justice system. Second, these indigents do not possess the resources to procure proper legal representation. Third, they have a constitutional right to legal representation. Finally, there is a serious lack of funding for legal services to indigents. Moreover, by and large, public sentiment has changed towards indigents, in that a significant segment of the general public seems disinclined to underwrite more services to the poor with tax dollars. The 1996 Welfare

felonies are indigents and cannot afford a lawyer.¹² Programs such as Legal Aid, Public Defender, Judicare, group and prepaid legal services, and legal clinics¹³ have been established to effectuate indigents' right to counsel. Although these programs have provided effective legal services to indigents, the fact remains that these programs are far from sufficient.¹⁴

In light of the shortcomings of such programs, coupled with cutbacks in both federal and state funding, especially since 1981,¹⁵ the private bar has been pressured to take a more active role in representing indigents. Moreover, courts have intimated that the services of an attorney may be constitutionally required for the indigent civil litigant.¹⁶ For example, courts have required attorneys to represent indigents in child custody cases,¹⁷ and in civil cases where the privilege against self-incrimination is or may be invoked.¹⁸

Lawyers providing legal services to indigents in both criminal and civil cases have had to do so for little or no compensation.¹⁹ In light of the enormity of this problem, the legal profession, and

Reform Bill, PL 104-193, 1996, HR 3734, which cuts programs to indigents and the Federal Legal Services Corporation Act of 1997, 42 U.S.C. 2996, which cuts funding to legal services to indigents, illustrate this point clearly. This scenario places a tremendous burden on the private bar to provide *pro bono* services to indigents.

12 See YALE KAMISAR & WAYNE R. LAFAYE ET AL., MODERN CRIMINAL PROCEDURE, n. G 71(6th Ed. 1986) (describing estimates concerning indigents in legal system).

13 See Aronson, *supra* note 11, at 148-153 (discussing various organizations enrolled in extending legal services to indigents).

14 See *id.*

15 Since 1981, the pendulum of public sentiment has swung against helping the poor and indigents. Funding has been cut and the poor are left mostly on their own. This new apathy toward the poor reached its peak in the 1996 with the enactment of several pieces of legislation. See, e.g., 1996 Welfare Bill, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PL 104-193, 1996, H.R. 3734; 1996 Immigration Bill, 8 U.S.C.A. 1601; 1997 Budget Reconciliation Bill, 7 Years Balanced Budget Reconciliation Act of 1997, H-R. Rep. 104-292; Legal Services Corporation Act, 42 U.S.C. § 2996; see also *Washington Journal* (C-Span television broadcast, December 5, 1997). Boston University's Professor of Economics, Dr. Glen Loury stated that despite public sentiment against funding programs for the poor, the social problems created by arbitrarily cutting off people from the welfare rolls may haunt America for years to come.

16 See, e.g., Alan J. Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 995 (1975) (indicating cases which have required attorney representation of indigent parties in civil matters).

17 See *Danforth v. State Dep't of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973) (holding that due process requires appointment of counsel to indigent parents in child custody cases).

18 See, e.g., *Maness v. Meyers*, 419 U.S. 449, 461 (1975) (holding that counsel is necessary for privilege against self-incrimination to exist).

19 See, e.g., ARONSON & WECKSTEIN *supra* note 11, at 121, 152-53 (discussing disproportionality between *pro bono* fees and fair market value of these services); see also Shapiro, *supra* note 8, at 777-84 (discussing low fees in *pro bono* work by attorneys).

indeed the entire justice system, must address several questions including, but not limited to: Can a judge compel a lawyer to defend an indigent client without compensation? Can a legislature require mandatory *pro bono* service from lawyers as a condition for the retention of their license to practice law?²⁰ In other words, since access to courts is a constitutionally protected right based on the Sixth Amendment, who has the obligation to protect this right? Who should bear the cost? Should this protection and cost be thrust upon one small segment of society (lawyers) or should it be borne by society at large? Moreover, can a policy that abridges one group's constitutional rights (lawyers right against takings) to protect the constitutional rights of another group (indigents access to courts) ever be justified? The ultimate question is not whether mandatory *pro bono* service is desirable, but rather, whether it is constitutional.

This article examines the aforementioned issues and responds to them. Section II traces the historical development of the "right to counsel," while Section III discusses the issues at stake. Pursuant to these two sections, the article will discuss in arguments for and against compulsory *pro bono* service, and constitutional concerns at both the state and Federal levels. Section IV presents a number of recommendations. For practical purposes, the involuntary servitude argument of the Thirteenth Amendment,²¹ the First Amendment issue and the Equal Protection argument will not be discussed.²²

20 In 1976, Assemblyman Knox of California introduced a bill (A.B. No. 4050) which required attorneys to render forty hours *pro bono* work per year as a condition to retain their license to practice law. Although the bill failed, it demonstrated a strong sentiment held by many.

21 See Rosenfeld, *supra* note 4, at 290-94 (providing good discussion of related analogies between mandatory *pro bono* work and involuntary servitude); see also Robert S. Hunter, *Slave Labor in the Courts - A Suggested Solution*, 74 CASE & COM., No. 4, 3 (1969) (discussing severity of hardship that court appointments have on attorneys where no provision for compensation exists).

22 Often the Equal Protection argument is made as a *de facto* or quasi Due Process argument. See, e.g., Shapiro, *supra* note 8, at 770-777. I conclude that the Equal Protection argument is a *de facto* or quasi due process argument because its proponents usually argue, not for other professional groups to be treated like lawyers, but for lawyers to be treated like other professional groups; Hunter, *supra* note 21, at 10. After stating that mandatory representation of indigents without compensation deprives attorneys of their "equal protection," the author concludes: "No court would consider ordering a grocer to give a shelf full of groceries to a poor person just because the state had given him the right to operate his business. Similarly, it is inconceivable that a doctor would be ordered by a court to give his services to the indigent. The plain fact is that it is not necessary for anyone other than lawyers to give their goods or services just because the court so orders." *Id.*

II. HISTORICAL DEVELOPMENT

A. Development and Application of the Sixth Amendment

The Sixth Amendment provides in relevant part that "in all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel."²³ In colonial times, defendants in North America were granted the right to be represented by retained counsel.²⁴ Between 1791 and 1932, state and federal courts heard virtually no cases on the right to counsel.²⁵ However, in 1932, the Supreme Court addressed the issue of the right to counsel for indigents in the landmark case of *Powell v. Alabama*.²⁶ In *Powell*, the Court held that indigent defendants have a right to appointed counsel in capital crimes.²⁷ Six years later, in 1938, the court extended this right to indigent defendants in felony federal trials.²⁸ In 1942, however, the Supreme Court refused to extend this right to indigent criminal defendants in state trials.²⁹ It was not until 1963, 21 years later, that this right was finally held applicable to the states.³⁰

²³ See U.S. CONST. amend. VI. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding right to counsel in federal court is fundamental right).

²⁴ See RONALD J. ALLEN & RICHARD B. KUHN, CONSTITUTIONAL CRIMINAL PROCEDURE 120 (1985) (discussing right to counsel with some historical perspectives); Roscoe Pound, *The Future of Criminal Law*, 21 COLUM. L. REV. 13, 16 (1921) (stating that in certain periods during 1920's, callousness towards defendants developed); see also *Powell v. Alabama*, 287 U.S. 45, 65 (1932) (stating that right to counsel in felony case was part of early common law).

²⁵ See Note, *An Historical Argument for the Right to Counsel During Police Interrogations*, 73 YALE L.J. 1000, 1031 (1964) (indicating that most states lacked rules for right to counsel). But see, e.g., *Andersen v. Treat*, 172 U.S. 24 (1898) (approving appointment of counsel by lower court); *Holden v. Hardy*, 169 U.S. 366, 386 (1898) (noting American superiority over English with respect to one's right to counsel).

²⁶ 287 U.S. 45, 71 (1932) (holding assistance of counsel is required in capital offenses).

²⁷ See *id.* at 71; see also ALLEN & Kuhn *supra* note 24, at 120 (discussing how *Powell v. Alabama* created special circumstances rule, which evolved into requirement of counsel in capital cases by 1961 in *Hamilton v. Alabama*, 368 U.S. 52 (1961)); Pound, *supra* note 24, at 13-16 (stating that national attention given Scotsboro cases prompted Supreme Court to hear *Powell v. Alabama*).

²⁸ See *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (indicating Sixth Amendment requires counsel to be provided to indigents).

²⁹ See *Betts v. Brady*, 316 U.S. 455, 461-72 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states are not required to provide counsel for indigent defendants).

³⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). The court heard about thirty cases in these twenty-one intervening years, and except for a few, found compelling reasons to entitle defendants to counsel. *Id.* *Gideon* made universal what was already all but universal. *Id.*

B. Development of the Concept of Effective Assistance of Counsel

According to the Supreme Court, the Sixth Amendment does not merely entitle the defendant to counsel, it entitles him to the *effective* assistance of counsel.³¹ This, however, is a judicial standard; the Constitution only requires assistance of counsel.³² The Court reasoned that the word "effective" was needed to give teeth to this Amendment. This interpretation has been justified by the contention that the effectiveness of counsel is demanded or else the defendant would be helpless against the powers of the state.³³ Therefore, effectiveness of counsel serves to counterbalance the unfairness existing between the state and the individual.³⁴ The stringent standard also ensures that defendants, especially indigent ones, are not left to the mercy of incompetent counsel.³⁵

Consequently, even a defendant who has been represented by counsel may nevertheless be able to show that his Sixth Amendment right has been violated. In such a case, the defendant is required to show (1) that the counsel's performance was deficient in the sense that counsel was not a reasonably competent attorney; (2) that the deficiencies in counsel's performance were prejudicial to the defense; and (3) but for the counsel's unprofessional errors, there was a reasonable probability that the result of the proceedings would have been different.³⁶

³¹ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 684-87 (1984) (indicating that Sixth Amendment requires effective assistance of counsel, not just right to counsel).

³² See U.S. CONST. amend. VI. In full, the amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

³³ See generally Pound, *supra* note 24, at 15 (discussing that accused need attorneys).

³⁴ See generally Note, *supra* note 25, at 1030 (indicating that Forefathers intended that accused have right to counsel).

³⁵ See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (stating that "defendants cannot be left to the mercies of incompetent counsel").

³⁶ See *Strickland*, 466 U.S. at 691-96 (holding that requirements must be met to have reversible error).

III. THE ISSUES AT STAKE

A. *Mandatory Pro Bono Service, Funding and the Courts*

The issue of compelled representation first arose in the context of suits brought by lawyers against county governments to collect fees that were awarded them by trial courts.³⁷ The majority of early cases "held that an attorney could not maintain an action against a county unless there was an express statutory authorization for funding."³⁸ The courts in these cases were more concerned with the liability of governmental bodies than with the well-being of the attorney.³⁹ A recurring issue during this period was the liability of a county for various services rendered to the poor.⁴⁰ In addressing this issue, courts have used three basic arguments, set forth below, to justify compulsory *pro bono* service: (1) the monopoly argument,⁴¹ (2) the officer of the court argument,⁴² and (3) the professional obligation argument

B. *Arguments in Support of Mandatory Pro Bono Service*

The monopoly argument suggests that compulsory *pro bono* service is justified since lawyers enjoy a monopoly in the delivery of legal services.⁴³ The nature of the services that lawyers pro-

37 See, e.g., *State v. Roper*, 688 S.W.2d 757, 760 (Mo. 1985) (describing history of compensation in cases where court appoints counsel).

38 See *id.* at 760 & n. 4 (discussing history of lawsuits against states by attorneys).

39 See *id.* at 761 & n. 5 (discussing liability of counties when it came to issue of indigents).

40 See, e.g., *Cantrell v. Clark County*, 1 S.W. 200, 201 (Ark. 1886) (indicating surgeon's care of pauper cannot later be charged to the County); *Manfield v. Sac County*, 14 N.W. 73 (Iowa 1882) (stating that County not liable for medical services to pauper when doctor did not comply with statutory requirements of trustee approval).

41 See *Roper*, 688 S.W.2d at 764 (illustrating theory that "the practice of law is a monopoly because it is limited to a select few and because that limitation results in restraints upon the public's use of legal services"); see also *Jewell v. Maynard*, 383 S.E.2d 536 (W.Va. 1989) (recognizing monopoly that lawyer's have as it relates to *pro bono* work).

42 See *U.S. v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) (holding that counsel are officers of the court and compelled service does not amount to taking without just compensation); see also *In re Amendments to Rules Regulating the Florida Bar-1.3.1(a) and Rules of Judicial Administration*, 598 So.2d 412, 412 (Fl. 1992) (holding that *pro bono* is part of lawyer's public responsibility as officer of court); *Jackson v. State*, 413 P.2d 488, 490 (Alaska 1966) (using officer of court theory in requiring *pro bono* work).

43 See Lester Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 626 (1973) (stating that there were "implicit limitations" on monopoly power of lawyers which may provide "a right of access to legal services.").

vide creates the monopoly, because the market for legal services is limited to lawyers who are certified by the state. Because this monopoly is granted by the state, this argument theorizes that the bar should be regarded as a public utility, and therefore regulated for the public interest.⁴⁴

The officer-of-the-court doctrine was developed in English common law because some lawyers employed by the court were granted special privileges. This doctrine has raised its head in some American cases. In utilizing this doctrine, the Ninth Circuit has held that the obligation to serve as appointed counsel without compensation is an ancient and established tradition, a condition arising out of the licensing of lawyers as officers of the court.⁴⁵ The court further added that an attorney is aware of this obligation and consents to it by entering the profession. Therefore, under this doctrine, an attorney cannot assert that *pro bono* service is an unjust taking of his services or property.⁴⁶

Lastly, courts have also relied on the notion that lawyers have a professional obligation to provide gratuitous services upon a court order.⁴⁷ According to one court, "the high purpose and traditions of the legal profession require that this burden be shouldered by its members."⁴⁸ Another court suggested that the profession of law rests upon its commitment to public service which requires its members to engage in *pro bono* activities.⁴⁹

C. Arguments Against Mandatory Pro Bono Service

Opponents of mandatory *pro bono* service argue that although entry requirements to practice law result in the enrichment of

⁴⁴ See *id.* at 626-27. Professor Brickman argues that the legal profession should be treated like public utilities and regulated as such. *Id.* This would give the state the right to demand free legal services from lawyers for indigents. *Id.* Professor Brickman's article was written over 23 years ago, and although his position has changed very little over those years, it would be interesting to know how he feels about this issue today. For instance, since utility companies all over the country are being deregulated, should the legal profession also be deregulated and unshackled from mandatory *pro bono* service?

⁴⁵ See *Dillon*, 346 F.2d at 633 (discussing and applying officer of court doctrine).

⁴⁶ See *id.* at 635 (holding that counsel did not have to be compensated for court compelled representation because of awareness when entering profession of traditions of representing indigents for little or no compensation).

⁴⁷ See *Roper*, 688 S.W.2d at 763 (presenting notion that lawyers have duty to practice gratuitous service to indigents).

⁴⁸ *State v. Clifton*, 172 So.2d 657, 667 (La. 1965).

⁴⁹ See *In re Synder*, 734 F.2d 334, 338-39 (8th Cir. 1984) (stating that it has been consistently recognized attorneys have duty to serve willingly as officer of court).

some lawyers, many others have not benefited from the windfall. Moreover, standards and entry requirements to practice law are erected for the protection of the public, not the enrichment of attorneys.⁵⁰ Any resulting enrichment is at best incidental.⁵¹

Furthermore, it is argued that the monopoly theory in favor of *pro bono* services is incorrect because there is no monopoly in fact.⁵² A monopoly is present only if a few lawyers are present in the market place. These lawyers would then be able to control the sale of legal services and the prices charged for these services. This is a situation that does not exist.⁵³ Additionally, in further

50 See *In re Conner*, 207 S.W.2d 492, 499 (Mo. 1948). The court stated that "the privilege to practice law, quite unlike the right of a citizen to engage in ordinary trade of business, carries no inherent right to continue in the practice." *Id.*; see also THOMAS MORGAN & RONALD ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS 1-26 (6th ed. 1995). The authors state that in order to protect the public from illiterate and otherwise incompetent attorneys, several steps were taken by the respective states as well as the American Bar Association. *Id.* First, apprenticeship periods were lengthened and enforced. Second, several bars raised their admission requirements. *Id.* Third, law school attendance and graduation were made mandatory before one could qualify to take the bar. *Id.* Finally, accreditation standards for law schools became so burdensome that many schools had to close their doors. *Id.*

51 See MORGAN & ROTUNDA, *supra* note 50, at 3 n. 3 (relying on Blodgett, *Time and Money: A Look at Today's Lawyer*, ABA JOURNAL, Sept. 1, 1986, at 47 and LISSY, AMERICAN MANAGEMENT ASSOCIATION COMPENSATION AND BENEFIT REVIEW 10 (May 1994)). The median income of lawyers was lower—\$64,448 in 1986. *Id.* According to the ABA survey, about 45% of American lawyers in 1986 earned between \$35,000 and 75,000 per year. *Id.* Another 35% earned between \$75,000 and \$250,000 annually. *Id.* About 16% earned less than \$35,000 per year, and about 4% earned over \$250,000. *Id.* Lawyer salaries, on average, have remained constant or even fallen in recent years. *Id.*

52 See BLACK'S LAW DICTIONARY 1007 (6th ed. 1990). Monopoly is defined as:

A privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity. A form of market structure in which one or only a few firms dominate the total sales of a product or service.

Id.; see also *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In this case, "monopoly" as prohibited by Section 2 of the Sherman Antitrust Act, has two elements: possession of monopoly power in relevant market and willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Id.*; *United States v. Otter Tail Power Co.*, 331 F.Supp. 54, 58 (D.C. Minn. 1971). A monopoly condemned by the Sherman Act is the power to fix prices or exclude competition, coupled with policies designed to use or preserve that power. *Id.*; *Davidson v. Kansas City Star Co.*, 202 F.Supp. 613, 617 (D.C. Mo. 1962). It is "monopolization" in violation of Sherman Antitrust Act for persons to combine or conspire to acquire or maintain power to exclude competitors from any part of trade or commerce, provided they also have such power that they are able, as a group, to exclude actual or potential competition and provided that they have intent and purpose to exercise that power. *Id.*

53 See MORGAN & ROTUNDA, *supra* note 50, at 2-3 & n.2. The authors note that as of 1995, there were about 875,000 practicing lawyers in the United States, 2 1/2 times the number for 1970. *Id.* Roughly 40,000 are added to the bar each year while roughly 15,000 leave annually. *Id.* If the present trend continues by the year 2000, there will be over 1,000,000 practicing lawyers in the United States. *Id.*; Derek Bok, *A Flawed Sys-*

contravention of the monopoly argument, non-lawyers can freely represent themselves in court even in serious cases.⁵⁴

If the monopoly argument is effective against lawyers, the result would be to require all other professional groups subject to licensing to render gratuitous services to indigent members of society.⁵⁵ The fact is only physicians can practice medicine, and only dentists can practice dentistry. Such professionals have and enjoy a monopoly. Applying the rationale that lawyers should be required

tem: Report to the Harvard Board of Overseers, 85 HARVARD MAG. 38, 41 (1983). The President of Harvard University states: "The net result of this trend is a massive diversion of exceptional talent into pursuits that add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit." *Id.*; see also Jane Burnbaum, "Guilty! Too Many Lawyers and Too Much Litigation: Here's a Better Way," BUS. WK., April 13, 1992, at 60-61. To make her case, the author mentions that there are 307.4 lawyers per 100,000 persons in the U.S., while there are only 100.7 lawyers per 100,000 persons in Britain; 83 lawyers per 100,000 persons in Germany; and 12.1 lawyers per 100,000 persons in Japan. *Id.* But see James O. Castagnera, *Why the Nation Needs More Lawyers*, 22 T. MARSHALL L. REV. 19, 25-27 (1996-97) The author argues that there is actually a shortage of lawyers in the United States. *Id.* In contradistinction to Bok, Castagnera avers that because of the training and experience of lawyers they are fit for varied professions in society. *Id.* If lawyers were utilized on a greater scale in other professions, their analytical and professional skills would add significantly to productivity thereby improving the economy. *Id.* Additionally, Castagnera makes the very important point that Burnbaum's article quotes statistics but does not take into account the differences in the other societies and the United States. Bok's assumption entails a number of logical leaps, while the Burnbaum's article is very strong on presenting empirical data, but very weak on analysis. For example, Bok diminishes, or totally disregards the very important role played by attorneys in all facets of contemporary life. Contrary to Bok's assertion, lawyers add much to the growth of the economy by fighting to enforce laws that encourage competition, commercial transactions, as well as individual liberty. Furthermore, lawyers add significantly to the development, expression and preservation of culture, by among other things, fighting to enforce intellectual property laws as well as the first amendment. Burnbaum, on the other hand, takes empirical data and attempts to apply it without any contextualization. In the process, she ignores the differences; cultural, constitutional, etc., which exist between the United States and the other countries mentioned in her article. For example, none of the other countries has a constitution like United States, nor do any of them emphasize individual rights as we do. Moreover, since 1992, the year in which Burnbaum wrote her article, the economy of the United States has out performed and out produced all other economies, including Germany and Japan; yet there are more lawyers in America today than in 1992. *Id.*; See generally, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. 1. 98-105 (Richard D. Heffner ed., 1960) (Orig. Pub. 1945). The author states that American Judges possess unique powers, unparalleled by judges in other countries. *Id.* Americans have Constitutional and Political Rights unparalleled by citizens in other countries. *Id.* Even political issues become rights upon which judges must rule. *Id.*

⁵⁴ See *World News Tonight*, (ABC television broadcast, Dec. 12, 1997). For example, the State of Arizona has established "Quick Court," which allows people to represent themselves, even in serious matters such as divorces. *Id.*; see also Andrew Blum, *LIRR Gunman Goes Pro Se With Perplexing Voir Dire - Strange Behavior Follows a Rejected Insanity Defense*, NAT'L L. J., Feb. 6, 1995, at A11. The case of Colin Ferguson, is an extreme, but clear example of non-lawyers representing themselves. *Id.*

⁵⁵ See *Sparks v. Parker*, 368 So.2d 528, 535 (Ala. 1979) (Maddox, J., dissenting). If this is a condition of a lawyer's license to practice law, then other professions subject to licensing should similarly be required to offer free service to indigents as a condition of retaining their license. *Id.*

to represent indigents, doctors and dentists, therefore, should be required to treat indigent patients without receiving a fee. Although access to courts is a constitutionally protected right,⁵⁶ while access to medical care is not,⁵⁷ such a distinction is immaterial. The questions that need to be asked are: Why shouldn't medical care be a constitutionally protected right? Does it make sense to say that a person has a right to legal counsel for fear of the loss of his freedom (imprisonment), but no right to medical care for fear of the loss of his life (death)? Although a constitutional argument can be made for medical care, this article, for practical purposes, will not address the merits of this issue.

Historically, the officer of the court doctrine is even more vulnerable to attacks than the monopoly argument. As early as 1794, the Supreme Court of Pennsylvania recognized that American attorneys during the colonial period did not enjoy the privileges and exemptions of their English counterparts.⁵⁸ In 1810, for similar reasons, the Virginia Supreme Court questioned the appropriateness of applying this doctrine in America.⁵⁹ Moreover, in 1854, the Indiana Supreme Court held that an attorney had no obligation to serve gratuitously, since the idea of an attorney having special privileges was obsolete.⁶⁰ The court further reasoned that the attorney's profession was his livelihood, and compared his services and compensation to that of other professionals.⁶¹

Courts today are no less scathing in their attack on this doctrine. The Missouri Supreme Court, for instance, has stated that the time has come to abandon the invocation of this doctrine, and to lay to rest this anachronism from English history. The rationale for such an attack is that the role of the English lawyer has no counterpart in America. Moreover, in distinguishing the Ninth Circuit case which applied the doctrine,⁶² the court reasoned that

⁵⁶ See Brickman, *supra* note 43, at 595 (describing right to access to courts).

⁵⁷ See *Harris v. McRae*, 448 U.S. 297, 298 (1980) (holding freedom of choice of indigent woman to terminate her pregnancy does not entitle her to financial resources under Hyde Amendment).

⁵⁸ See *Republica v. Fisher*, 1 Yeates 349, 350 (Pa. 1794) (stating that in England, attorney cannot be compelled to serve in militia or be arrested by original process).

⁵⁹ See *Leigh's Case*, 15 Va. 1 Mumf. 468, 486 (1810) (stating that person admitted to bar was not "office, civil or military, under the Commonwealth").

⁶⁰ See *Webb v. Baird*, 6 Ind. 13, 14 (1854) (indicating that attorneys have no special privileges in their favor).

⁶¹ See *id.*

⁶² See *U.S. v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965) (holding that attorney called by courts to represent indigents for less than his fee cannot bring claim).

the Ninth Circuit misunderstood English practice and focused its reasoning on the power of the English courts to appoint sergeants-at-law. These sergeants-at-law were actually public officials who shared no common role with contemporary American attorneys.⁶³

Courts giving credence to the professional obligation doctrine often rely on the Code of Professional Responsibility for their support.⁶⁴ This is based on a loose, and arguably irresponsible, interpretation of both Canon 2 of the Model Code of Professional Responsibility and Rule 6.1 of the Model Rules of Professional Conduct.⁶⁵ Furthermore, the development of the doctrine and the analysis posited by its proponents are fuzzy and unconvincing.⁶⁶ At best, the provisions of the present code, though desirable, are voluntary, hortatory, aspirational, and are not intended to be mandatory.⁶⁷ Moreover, a proposed mandatory requirement was rejected by at least one court.⁶⁸ The Kutak Commission, established by the ABA to deal with lawyers professional responsibilities, first recommended at least forty hours of service, "*Pro bono publico*," per year by each lawyer.⁶⁹ After much discussion, the Commission modified its proposal.⁷⁰ By late 1980, the Commission

63 See *State v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985) (abandoning doctrine that lawyers are officers of court); see also *Warner v. Commonwealth*, 400 S.W.2d 209, 211-12 (Ky. 1966) (stating that it was appropriate to question whether traditional officer of court doctrine had become unfair to bar, though ultimately did not adopt doctrine).

64 See *Bradshaw v. Dist. Court*, 742 F.2d 515, 518 (9th Cir. 1984) (relying on Model Code of Professional Responsibility); *In re Smiley*, 330 N.E.2d 53, 56 (N.Y. 1975) (stating that obligation is expressed in Code of Professional Responsibility); *Ex Parte Dibble*, 310 S.E.2d 440 (S.C. 1983) (indicating reliance on state ethical considerations that provide attorneys obligation to render free legal services).

65 See Swygert, *Should Indigent Civil Litigants in Federal Courts Have a Right to Appointed Counsel?*, 39 WASH. & LEE L. REV. 1267, 1297 (1982) (interpreting Model Code of Professional Responsibility).

66 See Christensen, *supra* note 3, at 1 (stating doctrine of professional obligation is unclear).

67 See Swygert, *supra* note 65, at 1267. The author indicates that the Code provisions were not meant to be mandatory. *Id.*; see also Shapiro, *supra* note 8, at 787-88. The Ethical Considerations are "aspirational in character," while the Disciplinary Rules are "mandatory in character," i.e. discipline may be imposed for a violation. *Id.* Lawyers duty to serve in *pro bono* capacity, falls within the "Ethical considerations" not the "Disciplinary Rules." *Id.*

68 See *State v. Roper*, 688 S.W.2d 757, 767 (Mo. 1985) (rejecting proposed mandatory provision and stating current Model Code only expressed policy favoring *pro bono* representation).

69 See, e.g., Memorandum from Donald J. Evans to Committee on Counsel Responsibility and Liability (Aug. 20, 1979). This recommendation appeared as Rule 9.1 in a draft prepared by the Commission in 1979 and was given limited circulation. *Id.*

70 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1980). The text of the proposal provides:

A lawyer shall render unpaid public interest legal service. A lawyer may discharge

returned to the policy taken in the 1979 Code,⁷¹ which only expressed a policy favoring and encouraging *pro bono* representation, not mandating it.⁷² After a series of very contentious debates, the mandatory and onerous provisions were stricken before they could become effective.

D. The Civil, Criminal Distinction

Sometimes, there has been made a distinction between *pro bono* service in civil and criminal cases.⁷³ According to the Missouri Supreme Court, there is little evidence that uncompensated appointments either were or should have been compelled in civil cases.⁷⁴ Moreover, the court held that the appointment of counsel is less compelling in civil cases than in criminal ones, because of the possibility that the defendant in a criminal case could be incarcerated.⁷⁵ Hence, the court stated that the indigent civil liti-

this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to such service to appropriate regulatory authority.

Id. The draft also provided:

A lawyer shall not decline appointment by a court or other authority to represent a person except for the following reasons or other good cause: Representing the client would be likely to result in a violation of the Rules of Professional Conduct. Representing the client would result in an unreasonable financial burden on the lawyer; or, the client or the cause is so repugnant to the lawyer as to impair the lawyer's ability to represent the client.

Id.; see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 to 2-30 (1980).

⁷¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (working Draft 1980). The full text of this revision was: "A lawyer should render unpaid public interest legal service. A lawyer may discharge this responsibility by providing professional services to persons of limited means or to improving the law, the legal system, or the legal profession." *Id.*

⁷² See *Pro bono Legal Service: An Executive Committee Position*, 36 Record of N.Y.C. B.A. 9 (1981). A lawyer shall participate in providing public interest legal services. A lawyer may discharge this obligation by activities on behalf of the public for improving the law, the legal system or the legal profession, by providing legal services to persons unable to afford adequate legal representation or to public service groups or organizations or by financial support for such activities or legal services. *Id.* The Executive Committee emphasized its opinion that both the present ABA code and its own proposal set forth an "ethical mandate" owed by each lawyer to the public. *Id.* at 10-11. At the same time, it urged that the mandate should be "enforced through self-evaluation and not disciplinary sanctions." *Id.* at 11. Finally, it was stressed that, in its view, the obligations could be satisfied in whole or in part by a financial contribution, *id.* at 11, but that public interest services rendered for compensation could properly be taken into account. *Id.* at 12.

⁷³ See *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) (discussing that direction to provide counsel to defendants in criminal cases comes from federal and state constitutions while there is no similar constitutional provision applicable to private litigation).

⁷⁴ See *State v. Roper*, 688 S.W.2d 757, 759-60 (Mo. 1985) (discussing "parcity of case law and concerning appointments in civil cases" and lack of history for appointments in civil actions).

⁷⁵ See *id.* at 767.

gant could find recourse in hiring a lawyer on a contingent fee basis,⁷⁶ or through legal organizations serving indigents.⁷⁷

The majority opinion in this case elicited a rather blistering attack from the dissent. First, the dissent chided the majority for taking the position that indigent civil litigants can find recourse from legal service organizations and volunteer lawyers in light of cutbacks in funding and their present overwhelming case load.⁷⁸ The dissent was similarly critical of the "free market" "contingent fee" suggestion of the majority. This suggestion was attributed this to "Posner's Darwinistic Analysis," which only assists a few selected civil litigants who have a strong possibility of recovering monetary award.⁷⁹

The dissent argued for a more consistent approach in assisting indigent civil litigants. In essence, an indigent person who wants to make a claim should have access to a lawyer responsible for personal and professional advice.⁸⁰ Furthermore, it was argued that if uncompensated appointment of counsel can be justified in criminal cases, similar justification can be found in some civil cases.⁸¹ For instance, concern for the administration of justice should be just as great in civil cases as it is in criminal cases.⁸² Moreover, the concerns of possible incarceration in criminal cases are also applicable to some civil cases, since the latter often result in criminal trials.⁸³ Hence, the dissent would order mandatory *pro bono* service in both civil and criminal cases, because the two kinds of cases differ only in degree, but not necessarily in quality.⁸⁴ Interestingly, however, even the dissent was silent on the issue of funding.⁸⁵

⁷⁶ See *id.* at 768.

⁷⁷ See *id.*

⁷⁸ See *id.* at 771.

⁷⁹ See *id.* at 757. This brings the law of the jungle and enshrines it into the pantheon of justice. *Id.* It is the survival of the fittest, redress to a few, and disregard to the many who just happen to be indigent. *Id.*

⁸⁰ See *id.*

⁸¹ See *id.* at 773.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.* This is a reasonable approach by the dissent, for justice is well serviced only when the least among us receives his/her fair portion. *Id.*

⁸⁵ See *id.*

E. States Constitutional Discussion

Some courts, relying on their state constitutions, have held that the appointment of counsel when there are no provisions for compensation, is unconstitutional. For instance, the Supreme Courts of Missouri, Indiana, and New Hampshire, relying on their state constitutions, have held that lawyers may not be compelled to provide representation without compensation.⁸⁶ These courts reasonably concluded that absent provisions for funding, indigents' rights would be so eviscerated as to be rendered virtually ineffectual. Other courts, also relying on their state constitutions, have refused to compel uncompensated appointments because the constitutions provide that persons [lawyers] have a right to compensation for their labor.⁸⁷ This latter reasoning also pushes the issue under the ambit of the United States Constitution, where courts, both state and federal, have had to grapple with this issue.

F. Federal Constitutional Discussion

1. Overview

The provisions of the United States Constitution relevant to the compulsory *pro bono* service debate affect lawyers on two levels. First, in a minority of states, the courts have looked to the United States Constitution for guidance in evaluating the merits of *pro bono* service. The Supreme Courts of Kentucky and Utah have both held that the burden of uncompensated service is an unconstitutional deprivation of property.⁸⁸ Moreover, the New York Court of Appeals has held that if mandatory uncompensated *pro bono* services are carried out on a broad scale, it would impose too great a burden on the bar, and would furthermore, rank as a violation of the constitutional rights of lawyers.⁸⁹

On the second level, it has been held by the Supreme Court that

⁸⁶ See, e.g., *Smith v. State*, 394 A.2d 834, 838 (N.H. 1978); *Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405, 412-15 (Ind. 1940); *Webb v. Baird*, 6 Ind. 13, 15 (1854).

⁸⁷ See, e.g., *Smith v. State*, 394 A.2d 834, 838 (N.H. 1978) (interpreting statute to mean that attorneys should be paid reasonable fees for court ordered appointments); see also *Webb v. Baird*, 6 Ind. 13, 15 (1854).

⁸⁸ See *Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972); *Beford v. Salt Lake County*, 447 F.2d 193, 194-95 (Ut. 1968).

⁸⁹ See *In re Smiley*, 330 N.E.2d 53, 57 (N.Y. 1975) (discussing great burden that would be placed on attorneys if they were forced to provide service in private litigation).

the right to practice law is a property right within the meaning of the Due Process Clause of the Fourteenth Amendment.⁹⁰ Furthermore, in *Marbury v. Madison*,⁹¹ the Supreme Court acknowledged that certain property rights are protected.⁹² Despite such precedent, both state⁹³ and federal⁹⁴ governments have the right to take private property for public use, provided just compensation is paid. This is referred to as the right of eminent domain.⁹⁵

Nevertheless, dating back to at least as early as 1922, the Supreme Court has made a distinction between "takings" and regulation.⁹⁶ If the state's action is a regulation pursuant to and consistent with its legitimate police powers, there is no compensatory taking.⁹⁷ However, if the regulation goes "too far," a taking occurs.⁹⁸ Problems arose since "too far" was left undefined for over sixty years until the Court addressed physical invasion cases.⁹⁹

90 See *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) (stating that person cannot be prevented from practicing law except for valid reasons).

91 5 U.S. (1 Cranch) 137 (1803).

92 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Even though the principal question addressed in this case was which branch of the government has the final say in interpreting the Constitution, the Court addressed the issue of property rights. *Id.*

93 See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 588 at n.2 (2nd ed. 1988). The power to take property by eminent domain is among the powers "reserved to the states" by the Tenth Amendment. *Id.*; see also P. NICHOLS, 1 *EMINENT DOMAIN* § 1.24 (ed. 1974). Despite early doubts about the eminent domain powers of the United States, since 1875, the right of the United States to exercise that power when reasonably related to its other powers has been undisputed. *Id.*; *Kohl v. United States*, 91 U.S. 367, 372 (1875) (stating that Fifth Amendment requires that private property shall not be taken without just compensation).

94 See TRIBE, *supra* note 93, at 589 & n.3. However, this taking can not be for private use. *Id.* See, e.g., *Missouri Pacific Rail Co. v. Nebraska*, 164 U.S. 403, 417 (1896). The first Supreme Court decision to hold that a governmental taking of property violates Fourteenth Amendment due process if it is for a private purpose and that compensation cannot cure such a taking. *Id.*

95 See BLACK'S LAW DICTIONARY 523 (6th ed. 1990). Eminent domain is defined as: "The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character. *Id.*; see also U.S. CONST. amend. V. In the United States, the power of eminent domain is founded in both the federal and state constitutions. The Constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as "condemnation," or "expropriation."

96 See *Pennsylvania. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (distinguishing what constitutes taking from other government regulations).

97 See *id.*

98 See *id.*

99 See TRIBE, *supra* note 93, at 599-604.

2. Taking Analysis in Brief

In 1798, Justice Chase's memorable dictum in *Calder v. Bull*¹⁰⁰ expressed the undisputed condemnation of any law attempting to "take property from A and give it to B."¹⁰¹ General principles of law, enforceable in a proper forum, settled that no form of legislative authority could be employed to serve private ends; taking, taxing, and regulation were all inherently linked to the public good and depended for their legitimacy upon the preservation of that link.¹⁰² In physical invasion cases,¹⁰³ the Supreme Court has grappled with the issue of "how much" invasion is constitutionally allowed before a taking occurs.

In *PrunYard Shopping Center v. Robins*,¹⁰⁴ students were barred from soliciting signatures for a petition drive on the premises of a shopping center. The California Supreme Court concluded that the free speech clause of its state's constitution entitled the students to set up their booth in the shopping center despite the fact that the shopping center was private.¹⁰⁵ The owners of the shopping center argued that by inviting third parties onto their property to conduct the petition drive, California was taking their property without just compensation.¹⁰⁶

The Supreme Court, in a unanimous decision, disagreed with the owners of the shopping center.¹⁰⁷ The Court held that the right to exclude others from one's property has long been recognized as a fundamental element of one's bundle of property rights.¹⁰⁸ Nevertheless, because shopping centers invite people

¹⁰⁰ 3 U.S. 386 (1798).

¹⁰¹ *Id.* at 387 (describing unlawful exercises of legislative authority).

¹⁰² See *TRIBE*, *supra* note 93, at 588 & n. 1-2.

¹⁰³ See *id.* at 599-60.

¹⁰⁴ 447 U.S. 74 (1980) (holding that shopping center could be used as forum for members of public to hand out pamphlets or seek signatures for petition opposing U.N. resolution).

¹⁰⁵ See *TRIBE*, *supra* note 93, at 600 & n.4. As much as it may have wished to, the California Supreme Court could not rest its decision on the First Amendment to the Federal Constitution, for the latter had been read as *not* giving people a right, over and above the right of the property owner, of free access to shopping centers for expressive purposes. *Id.*; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977) (allowing matters of public interest to be included in newscasts); *Hudgens v. NLRB*, 424 U.S. 507, 507 (1976) (prohibiting employees from entering shopping center for purposes of advertising strike against employer); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 551 (1972) (enjoining First Amendment protection of distributing handbills).

¹⁰⁶ See *PruneYard*, 447 U.S. at 74.

¹⁰⁷ See *id.* at 76 (articulating why prerequisite of free speech did not infringe upon owner's Fourteenth Amendment constitutional rights).

¹⁰⁸ See *id.* at 75 (articulating reasons for individual ownership rights); see also *Kai-*

onto their property, this did not fit the traditional property model. Therefore, the Court refused to view the fact that the appellant's property had been physically invaded by the petitioners as determinative.¹⁰⁹

In *Kaiser Aetna v. United States*,¹¹⁰ the Supreme Court held that a government regulation which invited third parties to trespass on private property to be a compensable taking.¹¹¹ The Kaiser Aetna Company secured a long-term lease for a 523-acre pond and surrounding lands. Kaiser decided to transform the area into a residential community.¹¹² After Kaiser had spent millions of dollars in developing the land, including transforming the pond into a navigable lake, a dispute developed between Kaiser Aetna and the United States Corps of Engineers.¹¹³ In essence, the Corps of Engineers insisted on getting public access to the pond.¹¹⁴ The question presented to the Court was whether "the government effect a compensable taking by saying to the general public, 'come on in.'" Although there was no expropriation, the government was regulating the property by inviting actual physical invasion by third parties.¹¹⁵

Unlike *Prune Yard*, *Kaiser Aetna* involved the traditional property interests because it pertained to property for which excluding the public was a critical part of the bundle of rights.¹¹⁶ The Court

ser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (enumerating "right to exclude" of property provides that government may not take without compensation); *Internat'l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (noting that defendant's property right is qualified, not absolute).

¹⁰⁹ See *PruneYard*, 447 U.S. at 83-84 (emphasizing that fact that appeal restricted to common areas conducted activity in orderly fashion).

¹¹⁰ 444 U.S. 164 (1979).

¹¹¹ See *id.* at 179-80 (holding that government regulation of private property to be compensable taking).

¹¹² See *id.* at 167 (describing leased properties of Kaiser Aetna).

¹¹³ *Id.* at 168 (discussing conflict between Kaiser Aetna and U.S. Corps. of Engineers).

¹¹⁴ See *id.* (discussing Corp. of Engineers argument that Kaiser Aetna was precluded from denying public access).

¹¹⁵ See *id.* at 180 (1979). The unconstitutional result would have been the same had the state sought to ensure public access to the marina by, for example, conditioning issuance to a marina resident of a permit to build a sun deck on the resident's granting to the general public of a right of access to the marina. *Id.*; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987). Conditional grant of permission to rebuild house on owner's allowance of public easement is not proper without payment of compensation. *Id.*

¹¹⁶ See *Kaiser Aetna*, 444 U.S. at 176 (noting that limitation imposed on traditional property interests as "taking"). But *c.f.* *PruneYard*, 447 U.S. at 84 (acknowledging "right to exclude" as not essential to use of value of property, and therefore limitations imposed not equivalent to "taking").

concluded that, while the consent of the Corps of Engineers in Kaiser Aetna's development plans could not estop the United States from now placing the pond under navigational servitude, it could engender investment-backed expectations rising to the status of property rights for which the government must pay when it effectively nationalizes them.¹¹⁷

In *Loretto v. Teleprompter Manhattan CATV Corp.*,¹¹⁸ cable companies in New York City gave 5% of their gross revenues to landlords in exchange for the landlords' authorization to make the necessary CATV installations.¹¹⁹ In order to give tenants access to the educational and community benefits of CATV, New York passed a law requiring all landlords to allow installation of CATV cables in exchange for a one-time fee of \$1.00.¹²⁰ The landlords, however, could demand that installation conform to reasonable conditions necessary to protect the appearance and safety of their premises,¹²¹ and were also entitled to indemnification by CATV for any damage resulting from installation, operation or removal of the CATV facilities.¹²²

A disgruntled landlord seeking a profit sued Teleprompter for trespass. The Supreme Court abandoned its *ad hoc* rule¹²³ and adopted a *per se* rule.¹²⁴ The *per se* rule, in summary, stated that a permanent physical occupation authorized by a government is a compensable taking, however significant the public interest.¹²⁵

After *Loretto*, in *Nollan v. California Coastal Comm'n.*,¹²⁶ the Supreme Court held that a state's refusal to grant a building permit until the transfer of a strip of the owner's property for permanent easement¹²⁷ amounted to a taking. The easement would only

¹¹⁷ See *Kaiser Aetna*, 444 U.S. at 179-180 (discussing conclusion that government may physically invade property, but must pay compensation).

¹¹⁸ 458 U.S. 419 (1982).

¹¹⁹ See *id.* at 423 (discussing Teleprompter's compensation policy for installation authorization).

¹²⁰ See *id.* at 423-24 (noting State Commission Ruling that landlord is entitled to one time fee of one dollar).

¹²¹ See *id.* (acknowledging landlord's right to demand quality work for aesthetic reasons).

¹²² See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419-23 & n.3 (1982) (setting forth New York law).

¹²³ See *id.* at 426 (indicating that inquiry is not "standardless"); see also *TRIBE, supra* note 93, at 599 & n.1. (defining and explaining types of *ad hoc* rules).

¹²⁴ See *Loretto*, 458 U.S. at 426 (adopting *per se* rule).

¹²⁵ See *id.* (setting forth elements of *per se* rule).

¹²⁶ 483 U.S. 825 (1980).

¹²⁷ See *id.* at 832 (holding "taking" includes conditional grant of permission to build

have permitted members of the public to walk along the owner's sandy strip parallel to the ocean, on their way to and from a public beach.¹²⁸ Even though this easement would not have permitted individuals to remain on the land, a physical occupation was found to exist. This amounted to a taking of the owner's property.¹²⁹

3. The Positive Law and Natural Law Debate

There has been a continuing debate in the area of constitutional law between adherence to Natural Law and Positive Law. As it relates to law, positivism is associated with the idea that law derives its binding quality solely because it proceeds from the state, which is the dominant political authority in civil society.¹³⁰ As stated by Thomas Hobbes, the nature of man, is a nature in a state of war, of every man against every other man.¹³¹ "Without organized government, the uncertainty and instability of the human condition prevent the development of individual personality, the growth of Art, and culture, and the acquisition of learning and knowledge."¹³² Consequently, all liberties and property must be surrendered to an absolute sovereign. In exchange, each person receives order and stability in society.¹³³ "Human greed and self interest made total subjection preferable to original liberty, so all right minded persons must surrender to the sovereign the

on owner's assent to public easement across private property).

¹²⁸ See *id.* at 829 (describing easement sought by Commission).

¹²⁹ See *id.* at 832 (describing characteristics of "takings").

¹³⁰ See GEORGE C. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW*, 292 (1973) (discussing positivism).

¹³¹ See THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMON WEALTH ECCLESIASTICALL & CIVIL* 81-2 (Michael Oakeshott ed., 1946).

So that in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory. The first, maketh men invade for gain; the second, for safety; and the third, for reputation. The first use violence, to make themselves masters of other men's persons, wives, children, and cattle; the second to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons, or by reflection in their kindred, their friends, their nation, their profession, or their name. Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man. For war, consisteth not in battle only, or the act of fighting; but in a tract of time, wherein the will to contend by battle is sufficiently known; as it is in the nature of weather.

Id.

¹³² See RICHARD EPSTEIN, "TAKINGS": PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7 (1985) (discussing human nature and its effect on government).

¹³³ See THOMAS HOBBS, *supra* note 131.

state."¹³⁴

The positivists, therefore, contend that procedural due process only serves the role of allowing individuals to get what is "theirs" as defined by positive rules of law.¹³⁵ This argument, carried to its logical conclusion and seemingly absurd end, justifies any limitation placed on both property rights and individual liberties by the government, since it is the government which grants such rights and liberties in the first place. Such absurdity might well have existed if the Fifth Amendment¹³⁶ and Fourteenth Amendment¹³⁷ to the Constitution did not exist. What use would the Fifth Amendment serve if the Federal Government had untrammelled power to take private property on a whim? Of what consequence would the Fourteenth Amendment avail if state governments could not be restrained in taking private property from citizens?

In stark contrast, Natural Law categorically rejects the notion that "private property and personal liberty are solely creations of the state."¹³⁸ On the contrary, Natural Law contends that the state was developed to protect property and liberty.¹³⁹ Moreover, "these conceptions, (personal liberty and private property) are understood independent of and prior to the formation of the state."¹⁴⁰ Therefore, "no rights are justified in a normative way simply because the state chooses to protect them,"¹⁴¹ instead the state develops certain rules based on what is right and what is wrong. For example, murder is not wrong because the state prohibits it, instead, the state prohibits murder because murder is wrong.¹⁴² Hence independent rules, "rules of acquisition, protection, and disposition specify how property is acquired and the rights its ac-

¹³⁴ See EPSTEIN, *supra* note 132, at 7-8.

¹³⁵ See Frank H. Easterbrook, *Substance & Due Process*, 1982 SUP. CT. REV. 85, 94-109 (acknowledging term "due process" as affording individuals those procedures that legislative branch mandates).

¹³⁶ See U.S. CONST. amend. V, *supra* note 7 (setting forth relevant part of Fifth Amendment).

¹³⁷ See U.S. CONST. amend. XIV, *supra* note 8 (setting forth relevant part of Fourteenth Amendment).

¹³⁸ See EPSTEIN, *supra* note 132, at 5. The author asserts that natural rights are less valuable when not regulated. Political power inhibits opportunism which creates insecurity, which leads to inefficient use of talents and goods. The existence of the state increases the value of natural rights. *Id.*

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *id.*

quisition contains.”¹⁴³ “None of these rests entitlements on the state, which only enforces the rights and obligations generated by theories of private entitlement.”¹⁴⁴

Moreover, John Locke postulates that individual natural rights to acquire and retain property do not originate with the sovereign, but are common gifts of mankind.¹⁴⁵ For instance, “though the earth . . . be common to all men, yet every man has a property in his own person. This nobody has a right to but himself. The labour of his body, and the work of his hands, we may say are properly his.”¹⁴⁶ Therefore, according to Locke, the organization of the state does not require the surrender of all natural rights to the sovereign.¹⁴⁷ Furthermore, “[i]f the state obtains its authority from the rights of those whom it represents, it can never claim exemption from the duty to compensate on the ground that it is the source of all rights. The natural law theory behind the Constitution precludes that result.”¹⁴⁸

4. Application of the Taking Analysis

Since the right to practice law is a property right in light of the Due Process Clause of the Fourteenth Amendment,¹⁴⁹ we need to address the question of what type of property rights do lawyers have in their profession. If a lawyer has property rights in his profession, are these rights similar to those in *Prune Yard*,¹⁵⁰ *Kaiser*

¹⁴³ See EPSTEIN, *supra* note 132, at 5.

¹⁴⁴ *Id.*

¹⁴⁵ See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, ch. 5, ¶ 25 (Thomas A. Peardon ed. 1952) (discussing distinction between rights originated by sovereign and those which are common gifts of mankind).

¹⁴⁶ *Id.* at ¶ 27.

Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his won, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by his labor something annexed to it that excludes the common right of other men. For his labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.

Id.

¹⁴⁷ See EPSTEIN, *supra* note 132, at 15. Individuals are not required to give up rights/possession; rather there exists a network of forced exchanges, where, in the end, everything is better off. *Id.*

¹⁴⁸ See *id.* at 42.

¹⁴⁹ See *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957) (indicating state cannot exclude person from the practice of law in manner or for reasons which contravene Fourteenth Amendment).

¹⁵⁰ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (holding that petitioning in privately owned shopping center, when reasonably exercised, is constitutional).

Aetna,¹⁵¹ *Loretto*,¹⁵² or *Nollan*?¹⁵³

It would be difficult, if not impossible, to analogize lawyers' rights to those of the owners of a shopping center. Lawyers' rights seem more traditional. That being the case, the protection they receive should accordingly be more traditional. In some respect, the *Kaiser Aetna* case¹⁵⁴ seems similar to that of an attorney compelled to render *pro bono* service to indigents by a mandate of a court or any other governmental agency. Like the owners in *Kaiser Aetna*, attorneys invest a great deal of time, effort, and money into becoming lawyers. If government, state or federal, abridges attorneys' rights to the "fruit of their labors," there is no reason why the Supreme Court, upon hearing such a case, should not reach the same conclusion as in *Kaiser Aetna*.

This would effectively debunk the positivists' position that since the state determines property rights, it can take them at will. This bitter sweet analysis was furthered by some of the Justices in *Arnett v. Kennedy*,¹⁵⁵ but was solidly rejected by a majority of the Court.¹⁵⁶

The *per se* rule utilized in *Loretto*¹⁵⁷ could also buttress a lawyer's right to just compensation when he is required to render service by a governmental edict. Although the cause is certainly noble and the public's interest is being served, the *per se* rule could justify a finding that when lawyers are required by government to render service without compensation, a taking occurs.

The case with the strongest applicability, however, is *Nollan*.¹⁵⁸ In *Nollan*, the Court held that the refusal of a state to grant a building permit except upon the transfer to the public of a permanent easement amounts to a taking of private property for which

¹⁵¹ See *Kaiser Aetna v. 44 U.S.* 164, 171-74 (1979) (holding private property may not be taken without just compensation).

¹⁵² See *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419, 431 (1982) (holding actual physical invasion of property is "taking").

¹⁵³ See *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 831 (1980) (demanding compensation be paid for conditional grant of permission to build public easement).

¹⁵⁴ See *Kaiser Aetna*, 444 U.S. at 164.

¹⁵⁵ See *Arnett v. Kennedy*, 416 U.S. 134, 153-55 (1974) (Rhenquist, J., concurring). Justice Rhenquist stated: "The property interest which [the appellants had] was itself conditioned by the procedural limitations which had accompanied the grant of interest, and that where the substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Id.*

¹⁵⁶ *Id.* at 167.

¹⁵⁷ See *Loretto*, 458 U.S. at 426.

¹⁵⁸ See *Nollan*, 483 U.S. at 825.

compensation is constitutionally required.¹⁵⁹ This is applicable to the argument that lawyers have constructive notice that they will be required to perform mandatory *pro bono* work, and that by entering the profession they recognize it as an implied condition to the license to practice law.¹⁶⁰ If the state in *Nollan* could not compel the property owners to grant the public an easement as a condition to procure a building permit, then the state should not be able to exact mandatory *pro bono* work from lawyers as a condition of their license to practice law. Courts have also considered the use of a professional's time, experience and skill to be a taking where such services are compelled because these attributes constitute a professional's stock in trade.¹⁶¹ Nevertheless, courts have not devised a clear standard to determine whether government action affecting private property is a compensatory taking. However, it has been recognized that when the burdens and benefits of appropriated services are equitably distributed, there is no compensatory taking because there is an average reciprocity of advantage.¹⁶² Therefore, courts could still find reasons to compel *pro bono* service. This, in essence, requires a weighing of burdens and benefits. Hence, if the indigent's need for a lawyer is as great as or greater than the lawyer's property right in his profession, then there is no compensable taking and *pro bono* service can be compelled by the court. Put another way, these courts are saying that in certain cases the indigent's need for a lawyer is so burdensome, that it outweighs the burden mandatory *pro bono* representation places on the legal profession. When this occurs, there is no compensable taking.

5. The Ultimate Dilemma Faced by the Court

After all the constitutional discussions, courts are still left with the dilemma of resolving four basic issues. First, courts must determine whether they have the power to compel representation.

¹⁵⁹ See *id.* (holding that right to exclude others from property is fundamental in property law)

¹⁶⁰ See *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) (holding that attorney appointed by court to take case does not have Fifth Amendment right to payment).

¹⁶¹ See, e.g., *Boyton v. R.J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D. Mass. 1941); *Weiner v. Fulton County*, 148 S.E.2d 143, 145 (1966); *Webb v. Baird*, 6 Ind. 13, 16-7 (1854); *McNabb v. Osmundson*, 315 N.W.2d 9, 15 (Iowa 1982); *Mount v. Welsh*, 247 P. 815, 821 (1926).

¹⁶² See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (explaining that if regulation on property goes too far, it will be recognized as taking).

Second, if they determine that they possess such powers, they must determine if they have the power to provide compensation for appointed counsel. Third, if they decide that they have the power to provide compensation, they must further determine the source from which such funds must be derived. Finally, if they can identify the source of the funds, they must decide at what rate (market rate or below market) these lawyers will be paid.

Thirty-six jurisdictions have decided the issue of mandatory uncompensated representation.¹⁶³ Twenty jurisdictions, including the federal court system, follow the rule that compensation of appointed counsel is not required.¹⁶⁴ In addressing this issue, courts have relied on both inherent and statutory powers. According to this line of reasoning, courts have the inherent power to take necessary actions to effectuate the administration of justice,¹⁶⁵ and to regulate the legal profession.¹⁶⁶ Courts have used this concept of inherent power in a variety of contexts, including providing counsel for indigents. Courts have also relied on statutory power to compel appointment.¹⁶⁷

In addressing the issue of the court's power to provide funding, eleven of the nineteen states in the majority appear committed to the existence and validity of an enforceable duty to serve for little or no compensation when ordered to do so by the court. There are, however, substantial reservations voiced in eight other states. For instance, the Georgia court has held that an attorney from whom services are demanded has a property right in his fees for those services. New York's highest court also expressed dissatisfaction with uncompensated appointments. The court held that it had discretionary power to make such appointments, but refused to do so in civil actions involving indigents when the legislature has made no provision for compensation.¹⁶⁸ This, however, offers little solace to the bar since the majority of cases in which indigents need counsel are for criminal offences.¹⁶⁹ The majority approach

163 See Shapiro, *supra* note 8, at 756.

164 See *id.*

165 See 20 AM JUR. 2D Courts §979 (1965).

166 See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102 (1991).

167 See *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 759 (Mo. 1985) (stating that statute does not authorize appointment).

168 See, e.g., *In re Smiley*, 330 N.E.2d 53, 58 (N.Y. 1975) (stating court has discretionary power to assign counsel without compensation in proper case).

169 See *id.*

(twenty jurisdictions), which allows compelled representation without provisions for compensation, still stands strong today.¹⁷⁰

IV. RECOMMENDATIONS

Indigents should be guaranteed their Sixth Amendment right to counsel in both civil and criminal matters, because only equal access to the court and the legal system will lead to equal justice. Nevertheless, lawyers also have rights that society should respect and protect. Lawyers expend time, effort, energy, and money in order to become attorneys. It is therefore unfair and unconstitutional¹⁷¹ to take lawyers' services without just compensation. To effectuate the constitutional rights of one group by denying those of another group is wrong.¹⁷²

In most jurisdictions, the question as to whether a judge can compel a lawyer to serve without compensation has already been answered in the affirmative.¹⁷³ However, because we are effectively choosing between an indigent's right to counsel and a lawyer's constitutional right to the gains of his labor, we need to determine who has the obligation of guaranteeing, protecting, enforcing, and paying for the constitutional rights of citizens.¹⁷⁴

It is the government that protects its citizens' constitutional rights. Consequently, it is the government's function and obligation to enforce the constitutional rights of its citizens, not the bar and individual attorneys. As Chief Justice Bird in *Yarborough v.*

¹⁷⁰ See *Ex Parte Dibble*, 310 S.E.2d 440, 443 (1983) (S.C. Ct. App. 1983) (declining to join other courts which have refused to appoint lawyers without compensation).

¹⁷¹ See James Adler, et al., *Pro bono Legal Services; the Objections and Alternatives to Mandatory Programs*, 53 CAL. ST. B.J. 24 (1978) (arguing that mandatory *pro bono* programs are philosophically, practically and possibly constitutionally objectionable).

¹⁷² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, 185-205 (1978). For a discussion of competing rights and a government's responsibilities to its citizens. *Id.*; see also, John Rawls, *The Basic Liberties and Their Priorities*, LIBERTY EQUALITY & LAW 9, 12 (M. Mc Murrin, ed. 1987) "The priority of liberty implies in practice that a basic liberty [cannot be limited even] for reasons of public good or perfectionist values. This restriction holds even when those who benefit from the greater efficiency, or together share the sum of the advantage, are the same persons whose liberties are limited or denied." Moreover: "Among the basic liberties of a person is the right to hold and to have the exclusive use of personal property." *Id.* at 12.

¹⁷³ See Comment, *The Uncompensated Counsel System*, *supra* note 2, at 710 (stating that counsel for poor in Kentucky always have served by court appointment and without pay).

¹⁷⁴ See Adler et al., *supra* note 171 (providing catalog of worthwhile suggestions pursuant to solving this problem).

*Superior Court*¹⁷⁵ stated in dissent, "[T]he financial burden engendered by ensuring the constitutionally guaranteed right to counsel squarely rests on the state."¹⁷⁶ Moreover, the government is strategically positioned to spread the burden over the society as a whole, by taxation, for instance, instead of burdening one segment of society unduly.¹⁷⁷

Taxation serves many functions. First, it is used to raise money for the operation of government at every level. Second, it is used to allocate the cost of public goods and services among Americans based on their income. Third, it is also used as a tool of social policy.¹⁷⁸ Admittedly, the word or even the very thought of "taxation" has never been popular with the masses.¹⁷⁹ Many elections have been either won or lost because of the issue of taxation.¹⁸⁰ Nevertheless, elected officials need to cultivate the political will to make decisions that are in society's best interest. Taxation is not the cure to all of society's ills, but at times it is not only necessary, it is desirable. Public officials should stop watching the polls, and start legislating and governing based on what is best, not what is popular.

Besides a direct tax on society at large, a number of other creative and innovative steps could be taken to preserve indigents' right to effective assistance of counsel. Indigents' legal counsel should be funded by the government just as the United States' Attorneys and District Attorneys are publicly funded. Imagine the outrage that would ensue, if the responsibility of prosecuting criminals was thrust upon the private bar. Placing the responsibility of representing indigents on the private bar should similarly

¹⁷⁵ See 216 Cal. Rptr. 732 (1984) (Bird C. J. dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ See Adler et al., *supra* note 171, at 25 ("That burden, like the costs of Social Security, Welfare, and similar mechanisms of meeting society's basic financial needs, should be borne equitably by all citizens.").

¹⁷⁸ See BURKE & FRIED, *TAXATION OF INDIVIDUAL INCOME*, 3 (1981).

¹⁷⁹ See GORDON S. WOOD, *RADICALISM OF AMERICAN REVOLUTION* 244 (1992) (stating people in original thirteen colonies rebelled against Stamp Act); THOMAS PAINE, *COMMON SENSE* 14-24, (Isaac Kramnick ed., 1976) (stating that series of tax levies (Sugar Act, Stamp Act, Townsend Act; etc.) led to uproar resulting in American Revolution); KENNETH C. DAVIS, *DON'T KNOW MUCH ABOUT HISTORY*, 44-48 (1990) (stating that problem was really taxation; issue of representation was raised only as smoke screen).

¹⁸⁰ See, e.g., George Bush, Read My Lips, No New Taxes Convention. In his acceptance speech at the Republican National Convention, George Bush exclaimed "Read my lips - no new taxes" and came from behind to soundly beat his opponent Michael Dukakis. Although this was not a one-issue campaign, it was this sound-byte which turned the tide for George Bush.

engender great outrage. Furthermore, there are valid public policy reasons for publicly funding legal services to indigents.¹⁸¹

First, it is in the interest of society that each defendant receive a fair trial. If a defendant, indigent or otherwise, does not receive a fair trial and he is convicted, the system loses its legitimacy.¹⁸² This is not only because an innocent person is convicted, but also because a guilty person is still at large, making a mockery of the system.¹⁸³

Further, even if the accused committed the act, the system similarly suffers if ineffective assistance of counsel denies him the opportunity to proffer defenses and/or justifications. This may give the impression that justice is for sale and only those with money can mount an effective defense and receive justice.¹⁸⁴ This undermines the system, erodes its legitimacy, and renders it suspect. Hence, to preserve the legitimacy of the system, or maybe even to restore it, some changes warranted. Wherever a United States Attorney is appointed, and/or a District Attorney is elected, there should be a corresponding Public Defender in that jurisdiction.¹⁸⁵ This should be a joint effort between the Federal Government and State Governments. The staff in each Public Defender's office

181 See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1991). "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence." *Id.* Cardozo was speaking here about justice. The first sentence could therefore be rephrased as this: "The final cause of [justice] is the welfare of society."

182 See RONALD DWORKIN, *LAWS EMPIRE* 1-2 (1986). "If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, . . . or a defendant leaves with an undeserved stigma." *Id.*

183 See CARDOZO, *supra* note 181, at 67. "[W]hen they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." *Id.* Prosecutors, judges, politicians and society as a whole need to understand that a conviction is no indicia of justice. Justice demands effective assistance of counsel. Effective assistance of counsel demands funding, and government (state/federal) has the authority and the obligation to fund programs to effectuate effective assistance of counsel to indigents.

184 The O.J. Simpson criminal case illustrated this point. Whether one believes he committed the crime, both sides can agree that but for his financial resources, he could not have waged such a successful defense. If this is true, shouldn't we shudder at the thought of the plight of indigent dependents caught up in our criminal justice system?

185 See JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1972). "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." *Id.* Rawls refers to this as his first principle. "The basic liberties of citizens are, roughly speaking, political liberty. . . . Together with freedom of speech and assembly; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights." *Id.*; see also *THE GREAT POLITICAL THEORIES* 463 (Michael Curtis, ed. Avon Books 1981).

should be paid at the same rate as the staff at the United States Attorney's Office and/or the District Attorney's Office. Moreover, the public defenders office should be so well financed that it can afford all the legal accoutrements enjoyed by the District Attorney and the United States Attorney. For instance, legal on-line services, computer assisted legal research, an up to date library, and the resources to retain reputable expert witnesses. Only then will indigents truly receive effective assistance of counsel.¹⁸⁶

In the alternative, attorneys serving indigent clients could be paid on the scale provided in the Federal Attorneys Fees Act (the Act).¹⁸⁷ The Act provides a scale based on the attorney's experience and skill. This would not be as radical as the recommendation immediately above, but it could be just as effective in delivering effective assistance of counsel to indigents.

Law schools could also be given grants to operate large scale legal clinics that cater to indigent clients. In the alternative, such a program could be broadened to include all institutions of higher education. The college or university legal clinics could be established and funded by "Block Grants," provided by state and federal governments.

Tax incentives could also be used at both the Federal and state level to make more quality legal services accessible to indigents. For example, large law firms which are often insulated from mandatory *pro bono* service could be induced to devote a certain percentage of their practice to *pro bono* work and receive a corresponding tax deduction for that percentage of their firm's profits.¹⁸⁸

Firms could also be induced to employ at least one extra associate per year with a commitment that these associates work for legal services organizations. For example, one such associate could work for the Legal Aid Society, while his firm pays his salary. The

186 See RAWLS, *supra* note 185. "[S]ocial and economic inequalities are to be so arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" *Id.*; see also CURTIS, *supra* note 185. "The second principal applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command. While the distribution of wealth and income need not be equal, it must be to everyone's advantage, . . . One applies the second principle by . . . arrang[ing] social and economic inequalities so that everyone benefits." *Id.*

187 See 42 U.S.C. 1988 (1994).

188 Admittedly, some firms have already established *pro bono* departments, but this practice is not embraced by a majority of firms. This needs to be adopted on a wider scale in order to be more effective.

firms, on the other hand, could receive a tax deduction for the salaries (whether in whole or in part) of these extra associates, as well as costs for operating the *pro bono* program.¹⁸⁹ Other firms could make contributions in other ways. They could make monetary contributions to legal services organizations and receive a tax deduction for such contributions. Legal services organizations would therefore be able to employ more attorneys, and update their technology which would maximize efficiency and enhance productivity, thereby ameliorating the problem.¹⁹⁰

Tax relief could also be granted to the solo and small firm practitioners who are desirous of, or are already engaged in offering legal services to indigents. For instance, those whose entire practice is devoted to the poor, could be offered a yearly abatement of a percentage of their otherwise burdensome student loan obligations. In the alternative, they could also be given a tax deduction for their student loan payments, as an inducement to serve the poor, as well as a reward for so noble a service. A tax deduction could also be granted for student loan interest payments for those who render legal service to the poor on a less than full-time basis.

Legal empowerment zones could also be established in poor neighborhoods. These would operate similarly to enterprise zones which have brought economic relief to many blighted areas. Lawyers who set up offices in these empowerment zones and devote their practice to the poor, could be given tax incentives, be qualified for low-interest loans, receive forgiveness of their student loans, and could be taxed at a lower rate for a specific period of time.

States could designate certain organizations as "legal empowerment organizations," and offer incentives for lawyers to work for such organizations for a specific period of time. Organizations such as Legal Aid, Legal Services, Public Defender, and Neighborhood Legal Services could be designated "legal empowerment organizations." For example, attorneys working for

¹⁸⁹ This would certainly lighten the burden of legal services organizations and lessen the affliction of indigents.

¹⁹⁰ The Legal Aid Society, for instance, is for the most part privately funded. When one contemplates the tremendous service being rendered by the Legal Aid Society, one could only imagine how much indigents' lot could be improved if there were more organizations of this nature active on a nation wide basis. For example, the Legal Services Corporation's "hands are tied behind its back" because it is forbidden by law to represent indigents' in criminal cases, even though indigent criminal defendants comprise the largest group in need of legal representation.

these organizations for a five year period could receive student loan forgiveness as well as other incentives.

Each state, as well as the federal government, could offer a certain number of scholarships or annual tuition reductions to law students who have an interest in serving the poor. These scholarships or reduced tuition would follow each student through to the completion of his studies. Upon completing his studies and passing the bar, each student would have to render legal service to the poor for an allotted period of time. The cumulative effect of all these suggestions would have an enabling effect in the delivering of legal services to indigents. For example, more money would be available to employ more attorneys in the organizations which serve the legal needs of indigents.

Some may argue that incentives are inappropriate, since salary is already paid to lawyers, even those rendering legal services to the poor. The sad commentary is that those who render legal service to the poor receive compensation way below the market rate, yet such lawyers, especially the sole practitioner, must operate in the same market as those who are well paid. Sadder yet, those of us who have served indigents have had to do so at a great financial sacrifice and at times even to the detriment of our credit rating.

The federal courts were correct in concluding that the right to practice law is a property right within the meaning of the Due Process Clause of the Fourteenth Amendment.¹⁹¹ This forbids the government from requiring a small number of persons (lawyers) from bearing the cost that ought to be assumed by the public at large.¹⁹² But instead of resorting to the *non sequitur* "reciprocity of advantage"¹⁹³ analysis, the court should have insisted that attorneys whose property is taken should be compensated. The courts should have recognized that in order for indigents to receive effective assistance of counsel, funding is critical. Otherwise, the courts are only rendering lip service to an idea, but offering little help to those in need of legal services, but locked in the vise of indigence.

¹⁹¹ See *Schwartz v. Bd. Bar Examin'rs*, 353 U.S. 232, 247 (1975) (holding that New Mexico deprived plaintiff of Due Process in denying him opportunity to qualify for protection of law).

¹⁹² See *Armstrong v. United States*, 364 U.S. 40 (1960).

¹⁹³ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (discussing theory of "reciprocity of advantage" in property rights case); DWORKIN, *supra* note 172, at 185-205.

The Court gets even deeper in the constitutional maze; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."¹⁹⁴ This is as dangerous as it is frightening. What rights are subject to limitations? If property rights are included, when will free speech, freedom of religion, and other rights be effected? Moreover, what are these implied limitations, and who determines these limitations.

In an effort to redeem itself, the Court has stated, "When it [the taking] reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act."¹⁹⁵ Surprisingly, the Court went even further by asserting that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹⁹⁶

This is the crux of the matter. The Court should have sent a clear message that when government takes property, it must offer just compensation.¹⁹⁷ Just compensation means full and perfect equivalent in money of the . . . property taken.¹⁹⁸ In other words, market value, "what a willing buyer would pay in cash to a willing seller."¹⁹⁹

Since the judiciary is the safeguard of our liberty and property under the Constitution,²⁰⁰ it must not safeguard one person's or group's liberty or property at the expense of those of another person or group.²⁰¹ As one great jurist stated, "[j]ustice is the tolerable accommodation of the conflicting interests of society" ²⁰² The rights of lawyers and those of indigent people are not necessarily mutually exclusive. Though conflicting at times, these competing rights can co-exist constitutionally.²⁰³

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See* U.S. CONST. amend V.

¹⁹⁸ *See* *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1863) (interpreting Fifth Amendment right to compensation in dam condemnation proceeding).

¹⁹⁹ *See* *United States v. Miller*, 317 U.S. 369, 374 (1943).

²⁰⁰ *See* Chief Justice Evans Hughes, *Elmira*, N.Y. (1906), *quoted in* WESLEY D. CAMP, *CAMP'S UNFAMILIAR QUOTATIONS: FROM 200 B.C. TO THE PRESENT* 163 (1990).

²⁰¹ *See* DWORKIN, *supra* note 172, at 185-205.

²⁰² *See* Judge Learned Hand, *quoted in* WESLEY D. CAMP, *CAMP'S UNFAMILIAR QUOTATIONS: FROM 200 B.C. TO THE PRESENT* 164 (1990).

²⁰³ *See* JOHN RAWLS, *POLITICAL LIBERALISM* 15-22 (1993). Rawls suggests instead that we adopt a system of cooperation, which operates to the benefit of society as a whole.

This can be accomplished if courts choose to grapple with the real issues instead of looking for safe harbors, easy answers, and resorting to politically safe decisions.²⁰⁴

V. CONCLUSION

Lest I be misconstrued, I believe that all lawyers should perform *pro bono* service. But I insist, that all lawyers, including tenured law professors,²⁰⁵ judges in the security of life-time or periodic tenure,²⁰⁶ and "big time" lawyers with their six-figure salaries, should be included.²⁰⁷ This is important for far too often, the burden falls on the little guy who is fighting to stay afloat. This obligation of lawyers, however, is not a legal one, it

A system which does not sacrifice the rights of any individual or group in order to grant an advantage to another individual or group. Only when we reach this point do we really achieve justice. *Id.*

²⁰⁴ See RONALD DWORKIN, A MATTER OF PRINCIPLE 9-32 (1985) (discussing judges making political decisions).

²⁰⁵ Many law professors and commentators who write glowing articles on the merits of mandatory *pro bono* service for lawyers are safe in their positions with their guaranteed salaries. By and large they write not so much as thinkers providing practical solutions, but more like armchair philosophers whose writings are rife with pedantry, not to the constitution, but to some ill-defined and ill-developed historical and professional obligation. See, e.g. Rosenfeld, *supra*, note 4, at 286-96. Rosenfeld is convinced that the practice is constitutional because the majority of jurisdictions enforce mandatory *pro bono* representation without pay and have always done so. *Id.* He further asserts that this is an obligation which attorneys already owes to the public. Moreover, since the government does not pay for the performance of public duty already owed, (jury service, for instance), attorneys cannot demand payment for mandatory *pro bono* service. *Id.* There are several problems with Rosenfeld's position. First, it elevates preponderance to the level of constitutionality. According to this line of reasoning, since mandatory *pro bono* service is required in the majority of jurisdictions in the United States, with the blessings of the majority of the courts, that makes the practice constitutional. Carried to its logical end, this concept would obviate the need for a constitution. If all matters can be settled simply by being accepted by the majority, I assert, there is no need for a constitution. Second, he elevates historicity to the level of constitutionality. Therefore, because practice has its roots in history that in and of itself grants it constitutional moorings. In terms of this obligation already owed by lawyers, Rosenfeld has yet to show how this duty developed and how it became obligatory. Simply put, Rosenfeld is simply echoing the mantra of tradition. The greatest difficulty with Rosenfeld's position however, is his assertion that lawyers can be required to perform this obligation without pay because the government does not pay for the performance of public duties, such as jury duty. But can jury duty really be analogized to a lawyer's professional service?; see also Oliver Wendell Holmes, 10 HARV. L. REV. 457, 469 (1897). Holmes found it "revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV." *Id.*

²⁰⁶ Admittedly, only Federal judges have lifetime tenure with good behavior, pursuant to Article III Section 1 of the Constitution. Nevertheless, even state judges who are elected or appointed for a stated term do enjoy a guaranteed salary for that period. Many lawyers called upon to represent indigents are themselves threatened by indigence.

²⁰⁷ Some of these lawyers are already involved in *pro bono* service. The case I am making here is for a greater effort from a wider segment of society, including those at the top: judges, professors, and big-time lawyers.

is only a moral obligation.²⁰⁸ We, like all other professional groups, have a moral obligation to help the poor. Nevertheless, we must not lose sight of the seminal issue. It is the government's responsibility to safeguard and guarantee its citizens' constitutional rights; hence, it is the government's responsibility to bear the costs consequent to such guarantees, not any one particular group of citizens.²⁰⁹

No other professional group has been burdened with so great an obligation as lawyers. For instance, although there is a constitutional protection of freedom of speech,²¹⁰ the media is not compelled to give free air time or newspaper space to every indigent who wants to make a point. Furthermore, there was not even enough support in Congress to pass a bill requiring media owners to grant free air time for something such as election campaigns.²¹¹ Similarly, although the Constitution guarantees freedom to travel,²¹² the government does not mandate that the travel industry offer free travel to every indigent person who wants to get from point A to point B. Moreover, although there are fundamental rights to marriage and procreation,²¹³ the gov-

²⁰⁸ We need to remember however, that moral obligations cannot be legislated, for they are generated by ethics rather than law. See Adler et al., *supra* note 171, at 25, quoting PRINCIPLES OF MORALS AND LEGISLATION 292 (J.H. Burns & H.L.A. Hart eds. 1970).

As to the rules of beneficence, these, as far as concerns matters of detail, must necessarily be abandoned in great measure to the jurisdiction of private ethics. In many cases the beneficial quality of the act depends essentially upon the disposition of the agent; that is, upon the motives by which he appears to have been prompted to perform it; upon their belonging to the head of sympathy, love of amity, or love of reputation; and not to any head of self-regarding motives, brought into play by the force of political constraint: in a word, upon their being such as denominate his conduct free and voluntary, according to one of the many senses given to those ambiguous expressions.

Id.

²⁰⁹ See generally Adler, et al., *supra* note 171 (arguing that this burden, like Social Security, welfare, and similar mechanisms of meeting society's basic financial needs, should be borne equitably by all citizens).

²¹⁰ See U.S. CONST. amend. 1.

²¹¹ Senator Arlen Specter, Republican of Pennsylvania, said he could not support the original McCain-Feingold campaign finance reform bill because "the free airtime provision constituted a taking of private property by government, without just compensation." *This Week* (ABC television broadcast, Sept. 21, 1997).

²¹² See U.S. CONST. amend. XIV; see also *N.Y. v. O'Neill*, 359 U.S. 1, 1 (1959) (discussing legality of forcing an out of state witness to testify to forum state); *Aptheker v. Sec. of State*, 378 U.S. 500, 517 (1964) (indicating freedom of travel is a constitutional liberty similar to rights of free speech and association); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (discussing fundamental right of interstate movement).

²¹³ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (discussing right of procreation).

ernment does not compel members of the clergy to officiate at weddings without compensation, nor are physicians compelled to render free procreational and prenatal service to indigents. Therefore, lawyers should not be compelled to render free legal service.²¹⁴

²¹⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 120-121 (1866). "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." *Id.* This, I assume, would include lawyers.